No. (1)

Supreme Court, U.S.
FILED

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William K. Suter, Clerk

In The Supreme Court of the United States

NUCOR CORPORATION, ET AL.,
Petitioners,

v.

QUINTON BROWN, ET AL.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Must a party seeking class certification under Fed.R.Civ.P. 23 demonstrate by a *preponderance of the evidence* that all requirements for such certification have been satisfied as held by the United States Courts of Appeals for the Second, Third and Fifth Circuits, or is the lower standard of *facial assessment* sufficient as held by the United States Court of Appeals for the Fourth Circuit in the case below?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

Petitioners

Nucor Corporation
Nucor Steel-Berkeley

Respondents

Quinton Brown
Jason Guy
Ramon Roane
Alvin Simmons
Sheldon Singletary
Gerald White
Jacob Ravenell

CORPORATE DICLOSURE STATEMENT

Pursuant to Rule 29.6, petitioners make the following disclosure:

1. Is party a publicly held corporation or other publicly held entity?

Yes. Nucor Corporation is a publicly held corporation listed on the New York Stock Exchange.

2. Does party have any parent corporation?

Nucor Steel-Berkeley is a division of Nucor Corporation.

3. Is 10 percent or more of the stock of a party owned by a publicly held corporation or other publicly held entity?

Yes. The two following entities own 10 percent or more of the stock in Nucor Corporation:

Barclays Global Investors, NA and related entities
45 Fremont Street
San Francisco, California 94105

State Farm Mutual Automobile Insurance Company and related entities
One State Farm Plaza
Bloomington, Illinois 61710

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of this litigation?

No.

5. Is the party a trade association?

No.

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CITATIONS OF THE OPINIONS AND ORDERS ENTERED IN THIS CASE

The opinion of the district court denying certification of the class is unreported, but available at *Brown v. Nucor Corp.*, No. 22005, 2007 WL 2284581 (D.S.C. Aug. 7, 2007). The opinion of the Fourth Circuit Court of Appeals reversing and remanding with instructions to certify is reported at *Brown v. Nucor Corp.*, 576 F.3d 149 (4th Cir. 2009).

BASIS FOR JURISDICTION IN THIS COURT

This petition seeks review of the decision of the United States Court of Appeals for the Fourth Circuit dated August 7, 2009, as modified October 8, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1951, providing for review of final decisions of the United States courts of appeals. This petition is filed within 90 days of the disposition of petitioners' petition for rehearing in the Court of Appeals, which was disposed of on October 8, 2009. *See* Appendix, at A-1.

STATUTORY PROVISIONS INVOLVED

This case raises an issue of the application of Rule 23 of the Federal Rules of Civil Procedure. The text of Rule 23 is set out in the Appendix pursuant to Rule 14.1(f).

STATEMENT OF THE CASE

This case widened or opened a split in the circuits with regard to the burden of proof placed upon the proponent of class certification under Fed.R.Civ.P. 23. In the decision below, the United States Court of Appeals for the Fourth Circuit adopted a standard that merely required the moving party to present evidence which upon a "facial assessment" supports the elements required for certification. (*See* Appendix, at A-22 n.10). In decisions in 2008 and 2009, the Fifth, Third and Second Circuits, confronted with the same issue, adopted preponderance of the evidence as the burden placed upon the moving party.

The Fifth Circuit rejected a "reasonable trier of fact standard" as substantially less stringent than the preponderance standard that it adopted in *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 228 (5th Cir. 2009). The Third Circuit held that the applicable standard was preponderance of the evidence, rejecting a standard requiring only a "threshold showing" as inadequate and improper. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 321 (3d Cir. 2009). The Second Circuit also explicitly rejected more relaxed standards of "some showing" or "preliminary assessment" in the case of *In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006), and adopted the preponderance burden in *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d 196, 202 (2d Cir. 2008).[1]

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[1] Although the Eleventh and District of Columbia Circuits employed "some showing" language in passing in *Vega v. T-*

The Fourth Circuit's adoption of the more lenient burden came in the context of Rule 23(f) review of the denial of class certification in the district court. The case below arose out of a single case filed against Nucor in the United States District Court for the Western District of Arkansas. The original case was severed into four, and transferred to four district courts. The case below was transferred to the District of South Carolina, because it involved allegations of discrimination at one of several Nucor plants in that state. All four cases were denied class certification in the district courts.

The case below asserted class claims for pattern and practice employment discrimination in promotions, disparate impact employment discrimination in promotions, and hostile work environment. The district court here denied certification for failure to meet the commonality and typicality requirements of Fed.R.Civ.P. 23(a)(2) and 23(a)(3).

As material here, the court of appeals held that the district court erred in finding that the plaintiffs failed to demonstrate the elements of commonality and typicality. Applying a standard that it characterized as "a facial class certification

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Mobile USA, Inc., 564 F.3d 1256, 1267 (11th Cir. 2009), and *Garcia v. Johanus*, 444 F.3d 625, 634 (D.C. Cir. 2006), the latter citing *Caridad v. Metro North Commuter R.R.*, 191 F.3d 283, 292 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000), *overruled, In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006), neither court addressed the evidentiary implications of that language.

assessment" (*see* Appendix, at A-22 n.10), the majority held that the district court improperly discounted plaintiffs' direct evidence, which the majority held was alone sufficient to establish commonality. (*Id.*, at A-12). The majority also held that the district court improperly excluded plaintiffs' alternative benchmark for missing employment data and therefore erred in finding plaintiffs' statistical analysis insufficient to establish commonality. (*Id.*). Finally, the majority held that the district court erred in finding an insufficient basis for commonality in the hostile work environment claim. (*Id.*).

Most of the opinion for both the majority and the dissent addressed plaintiffs' statistical evidence of discrimination in promotions. (*See id.*, at A-13-23 (majority); A-40-42, 45-58 (dissent). It was the treatment of plaintiffs' statistical evidence that most clearly crystallized the differing burdens applied.

The majority several times said that the district court "excluded" plaintiffs' statistical evidence (*see, e.g., id.*, at A-12, 20, 23), but the evidence was never excluded in the sense it failed to come into evidence. Instead, what the majority meant was that the district court did not credit the plaintiffs' statistics as facially presented. (*See id.*, at A-12) ("The court...discredited the statistical evidence...").

The actual available statistical evidence concededly did not show discrimination (*see id.*, at A-47), but it was incomplete because part of the data from the class period had been discarded. (*See id.*, at

A-15-16). Plaintiffs' experts developed proxy data for the missing period that plaintiffs sought to have included. (*Id.* at A-16). Nucor's experts criticized the methodology used in generating the proxy data. (*See id.*, at A-48-55). In the end, the district court did not require plaintiffs to include post-suit data as sought by Nucor, but found that the assumptions necessary to utilize the proxy data for the missing period diminished its probative value. (*See* id., at A-21). Therefore, the district court found that the actual data were more probative than the reconstructed data based on mere assumptions. (*Id.*, at A-20 n.7). Hence, the proxy data was excluded only in the sense that the district court gave greater evidentiary weight to the results of the actual statistics than to the study incorporating the proxy data. On appeal, the majority held that the district court abused its discretion when it found itself unpersuaded by the alternative calculations of the missing data. (*Id.*, at A-23).

In the majority's view, the district court lacked discretion not to accept plaintiffs' proffered statistical evidence at face value, despite the contrary evidence from Nucor. This is shown by the majority's citation to *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 293 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000), *overruled*, *In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006) (Appendix, at A-23), a case that figured in the Second Circuit's analysis of its class action jurisprudence on the burden of proof in *In re Initial Public Offerings Litig.*, 471 F.3d 24 (2d Cir. 2006). The majority quoted the following language from *Caridad*:

> More detailed statistics might be required to sustain the Plaintiffs' burden of persuasion, but [these statistics], in conjunction with the anecdotal evidence, satisfy the Class Plaintiffs' burden of demonstrating commonality for purposes of class certification.

(*See* Appendix, at A-23, citing *Caridad*, *supra*.)

Caridad is the source of language which led to the "some showing" standard that the Second Circuit rejected in *In re IPO* and *Teamsters Local 445*. As material here, the *Caridad* court held that the statistical report and anecdotal evidence submitted by the *Caridad* plaintiffs was sufficient to show commonality, despite strong countervailing evidence from defendants. 191 F.3d at 292. Earlier in the same paragraph quoted by the majority below, the *Caridad* court said:

> Though Metro-North's critique of the Class Plaintiffs' evidence may prove fatal at the merits stage, the Class Plaintiffs' need not demonstrate at this state that they will prevail on the merits. Accordingly, this sort of "statistical dueling" is not relevant to the certification determination

Caridad, 191 F.3d at 292.

The majority below held that the district court lacked discretion to fail to give decisive weight to

plaintiffs' evidence of commonality and typicality. (*See* Appendix, at A-27). The dissent, in contrast, concluded that plaintiffs had failed to meet the Rule 23 burden of proof as to either direct or statistical evidence. (*Id.*, at A-56 n.14).

In the debate in the opinion between the majority and the dissent on the proper standard (*see* Appendix, at A-22 n.10; A-35-40 (Agee, J., dissenting)), the two sides characterized their difference as one of class certification vs. the merits. The majority said the dissent "has stepped to the other side" of "a fine line between a facial class certification assessment and an assessment on the merits." (*Id.*, at A-22 n.10). The dissent cited numerous authorities to show that the issue whether the elements required for class certification are satisfied must be addressed through findings, even if those finding overlap with the merits. (*See, e.g.*, *id.*, at A-39, citing *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365-66 (4th Cir. 2004), and *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006)).

Read in light of contemporary decisions such as *Alaska Elec. Pension Fund, In re Hydrogen Peroxide*, and *Teamsters Local 445*, *supra*, however, it was apparent that the majority and the dissent started from differing premises about the burden on plaintiffs. The majority, following *Caridad*, assumed that the district court's analysis should have been limited to a facial assessment of plaintiffs' evidence. (Appendix, at A-12 n.10). According to the majority, because plaintiffs' evidence was sufficient on a facial assessment to show that the threshold requirements

of commonality and typicality had been met, inquiry should end. The majority held that the district court's detailed analysis was more appropriate to the merits, and the district court's reliance on Nucor's critique of plaintiffs' statistical study was improper under *Caridad*.

The dissent, on the other hand, emphasized the district court's duty to consider all the evidence and to reach conclusions. (*See, e.g.*, *id.*, at A-34-35). The dissent emphasized the role of the district court in weighing all evidence, including the criticism by Nucor's statistical expert of plaintiffs' use of proxy data to make up for missing information in plaintiffs' statistical analysis. (*Id.*, at A-47, A-54-55). As a result the dissent concluded that the district court had discretion to find that the plaintiffs had failed to satisfy their burden of proof. (*Id.*, at A-56 n.14). Neither the majority nor the dissent explicitly focused on the fact that they were analyzing the evidence under different standards.

Because it was plain from the decision as initially rendered that the majority and the dissent had applied differing burdens, Nucor raised the issue directly in the petition for rehearing below (*see id.*, at A-64, 68-70). Nucor cited the potential of a circuit split, because the majority's facial assessment standard was inconsistent with the standards adopted by the Second, Third, and Fifth Circuits. In denying the petition for rehearing, the majority made slight modifications in its opinion (*see id.*, at A-3), but did not address the burden of proof question.[2]

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[2] The revisions were directed to the original holding that remand with directions to certify was appropriate because

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED

1. The Fourth Circuit's "Facial Assessment" Standard is Inconsistent with Decisions from Three Other Courts of Appeals that Have Considered the Issue of Burden of Proof in Class Certification, and There is Now a Split in the Circuits.

A split in the circuits is one of the Court's express considerations in deciding whether to grant certiorari. *See* Sup.Ct.R. 10(a). Here, the court below went against a trend on the issue of the burden of proof placed on the class proponent reflected in recent decisions in the Second, Third, and Fifth Circuits. All three held that the class proponent must establish the requirements of Rule 23 by a preponderance of the evidence.

In *Alaska Elec. Pension Fund*, 572 F.3d at 228, the Fifth Circuit rejected the appellant's argument that the trial court erred in not applying a "reasonable trier of fact" standard, a substantially less stringent standard than preponderance. The Fifth Circuit held that its precedents foreclosed the position that the standard could be other than

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satisfaction of Rule 23(a) automatically satisfied Rule 23(b). (*See* Appendix, at A-70-71). In the face of the argument that this was contrary to controlling decisions of this Court, that language was deleted but not the relief ordered (remand with instructions to certify the class). No court has ever ruled on Rule 23(b) issues in this case.

preponderance of all admissible evidence. *Id.*, at 228-29.

Among the authorities from other circuits cited by the *Alaska Elec. Pension Fund* court was the Third Circuit decision, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008). The *Hydrogen Peroxide* court noted that apart from the burden resting clearly on the party seeking certification of the class, little guidance is available on the subject of the proper standard of proof for class certification. *Id.* at 315-16. The court held that 2003 amendments to Rule 23 made clear that the proper task of the district court was to carefully consider all relevant evidence and make a definitive determination that the requirements of Rule 23 have been met before certifying a class. *Id.* at 320. The court overturned the district court decision that required only a "threshold showing" that Rule 23's requirements were met. *Id.* at 321. In doing so the court said:

> Invoking the phrase "threshold showing" risks misapplying Rule 23. A threshold showing could signify, incorrectly, that the burden on the party seeking certification is a lenient one (such as a prima facie showing or a burden of production) or that the party seeking certification receives deference or a presumption in its favor. So defined, "threshold showing" is an inadequate and improper standard. "[T]he requirements of Rule 23 must be met, not just supported by some evidence." [*In re Initial Public Offerings Sec. Litig.*] ,

> 471 F.3d [24,] 33 [(2d Cir. 2006)]; *see, e.g.*, *id.* at 40 42 (rejecting the view that a party seeking certification need only make "some showing" with respect to Rule 23 requirements).

In Re Hydrogen Peroxide, 552 F.3d at 321. The court concluded that the factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence. *Id.* at 320.

In re Initial Public Offerings Sec. Litig., 471 F.3d 24 (2d Cir. 2006), cited above, was the Second Circuit's initial repudiation of the "some showing" standard of proof for class certification determinations. The district court in *In re IPO* had explicitly adopted the "some showing" standard from *Caridad*, 191 F.3d at 292, and *In re Visa Check / MasterMoney Antitrust Litig.*, 280 F.3d 124, 134-35 (2d Cir. 2001), *cert. denied,* 536 U.S. 917 (2002), *overruled*, *In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006). *See In re IPO*, 471 F.3d at 30. The *In re IPO* court held that the use of the "some showing" standard was error. *Id.* at 32.

The *In re IPO* court acknowledged that the Second Circuit's case law had been less than clear and on occasion had used language that led the district court astray. *Id.* In analyzing the case law, the *In re IPO* court noted that a number of district courts understood *Caridad* to permit certification on only "some showing" that Rule 23 requirements have been met. *Id.*, at 35 n.5. After discussing case law in the Second and other circuits and the effect of the 2003 amendments to Rule 23, 471 F.3d at 36-40, the

In re IPO court concluded that it could no longer continue to advise the district courts that the "some showing" standard of *Caridad*, 191 F.3d at 292, would suffice to meet Rule 23 requirements. *In re IPO*, 471 F.3d at 40. The court said that "our conclusions necessarily preclude the use of a 'some showing' standard, and to the extent *Caridad* might have implied such a standard for a Rule 23 requirement, that implication is disavowed." *Id.*, at 42.

Having repudiated the "some showing" standard in *In re IPO*, two years later the Second Circuit eliminated any remaining confusion as to its position in *Teamsters Local 445*, 546 F.3d at 202:

> Although we did not use the words "preponderance of the evidence" in *In re IPO* to describe the standard of proof applicable to Rule 23 issues, we in effect required the application of a cognate standard by directing district courts to "assess all of the relevant evidence admitted at the class certification stage," to "resolve []factual disputes relevant to each Rule 23 requirement," and '[to] find[] that whatever underlying facts are relevant to a particular Rule 23 requirement have been established," notwithstanding an issue's overlap with the merits. *Id.* at 41-42. Today we dispel any remaining confusion and hold that the preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements.

Teamsters Local 445, 546 F.3d at 202.[3]

Even though petitioners called to the attention of the court below the fact that adhering to its "facial assessment standard" opened a split in the circuits (*see* Appendix, at A-68-70), the court adhered to what was essentially the standard rejected by the other circuits, going so far as to cite *Caridad*.

The Eleventh Circuit has employed the "some showing" language in *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1267 (11th Cir. 2009), saying: "Nevertheless, a plaintiff still bears the burden of making *some showing*, affording the district court the means to make a supported factual finding, that the class actually certified meets the [Rule 23(a)(1)] numerosity requirement." *Id.* (emphasis added) *See also id.* at 1268 n.12 ("We note that plaintiff's failure to make a showing of numerosity ..."). In *Garcia v. Johanns*, 444 F.3d 625, 634 (D.C.Cir. 2006), the court

> affirmed denial of class certification because because plaintiffs failed to because appellants failed to show a *common* facially neutral USDA farm loan policy, resulting in the disparate impact on them and the putative class of Hispanic farmers. *See Caridad v. Metro-North*

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[3] In *Ilhardt v. A.O. Smith Corp.*, 168 F.R.D. 613, 617 (S.D. Ohio 1996), the district court construed the Sixth Circuit's decision in *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1079-80 (6th Cir. 1996), to impose a preponderance standard, although the Sixth Circuit did not expressly use that term.

> *Commuter R.R.*, 191 F.3d 283, 292 (2d Cir. 1999) ("Of course, class certification would not be warranted absent some showing that the challenged practice ... has a disparate impact on African-American employees at Metro-North.")

Garcia, 444 F.3d at 634 (emphasis in original).[4] If the use of this language was carefully advised and considered the circuit split is even more extensive.

2. Uniformity of Application of Federal Rules of Procedure is Grounds for Intervention of This Court.

The Federal Rules of Civil Procedure, by virtue of the terms of the Rules Enabling Act, 28 U.S.C. § 2072(a), the authority under which the Rules are issued, are rules of general application. In one of its most important decisions on the application of Rule 23, this Court held that the Rule's provisions are mandatory and the courts have a duty to enforce them, and lack the discretion to modify those provisions. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620, 624 (1996).(1996).

The clear corollary of its general, mandatory, and unalterable character is that Rule 23 should have a uniform application in the federal courts. Now it does not. The diminished burden of proof means that cases that would be certified in the

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[4] *Garcia* was decided before *Caridad* was overruled. The D.C. Circuit has not revisited the issue since the Second Circuit overruled *Caridad*.

Fourth Circuit may well be denied certification in the Second, Third or Fifth Circuits as a matter of law.[5] The differing standards also offer disparate persuasive authority to the other circuits confronting the issue, absent a clarifying decision from this Court. These are sufficient grounds for the intervention of this Court. *See United States v. Robinson*, 361 U.S. 220, 222 ("Because of the importance of the question to the proper and uniform administration of the Federal Rules of Criminal Procedure, we granted certiorari.").

The facial assessment standard is also contrary to the decisions of this Court.

In *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982), this Court held that actual, not presumed, conformance to Rule 23(a) is indispensable to class certification. "Actual conformance" is a standard difficult to square with any burden lesser than a preponderance of all the relevant evidence.

In addition, the *In re IPO* court reasoned that the 2003 amendments to Rule 23 mandated a more

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[5] This diminished burden and the circuit split it creates become even more evident when one considers that the majority instructed the district court on remand to certify a plaintiff class without *any* court having found the proposed class to satisfy the requirements of Rule 23(b) by a preponderance of the evidence. Such certification amplifies the split among the circuits and directly contradicts this Court's opinion in *Amchem*. *Amchem Prods.*, 521 U.S. at 614 ("[i]n addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3).")

searching inquiry that included the requirement for findings based on all of the relevant evidence. The facial assessment standard, like the "some showing" standard in *Caridad*, means that all evidence is not weighed at the certification stage. Thus the federal courts are not applying Rule 23 in a consistent manner.

CONCLUSION

The Fourth Circuit's adoption of the facial assessment standard of proof for class certification opens or continues a split in the Circuits on this issue. The Second Circuit, the source of the equivalent "some showing" standard, has repudiated it after extensive analysis in two decisions. But in spite of its history, this more lenient burden of proof has been adopted in the Fourth Circuit under the name "facial assessment," employing the repudiated authority of *Caridad*. A writ should issue to resolve the conflict with the Second, Third and Fifth Circuits so as to provide guidance to the lower federal courts on this important issue of federal procedure.

Respectfully submitted,

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No. _____

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NUCOR CORPORATION, ET AL.,
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v.

QUINTON BROWN, ET AL.,
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On Petition for Writ of Certiorari
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APPENDIX

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FILED: October 8, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1247
(2:04-cv-22005-CWH-GCK)

QUINTON BROWN; JASON GUY; RAMON ROANE; ALVIN SIMMONS; SHELDON SINGLETARY; GERALD WHITE; JACOB RAVENELL,
individually and on behalf of the class they seek to represent,

Plaintiffs – Appellants,

v.

NUCOR CORPORATION;
NUCOR STEEL BERKELEY,

Defendants – Appellees.

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Michael, Judge Gregory and Judge Agee.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: October 8, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1247
(2:04-cv-22005-CWH-GCK)

QUINTON BROWN; JASON GUY; RAMON ROANE; ALVIN SIMMONS; SHELDON SINGLETARY; GERALD WHITE; JACOB RAVENELL,
individually and on behalf of the class they seek to represent,

Plaintiffs – Appellants,

v.

NUCOR CORPORATION;
NUCOR STEEL BERKELEY,

Defendants – Appellees.

ORDER

The court amends its opinion filed August 7, 2009, as follows:

On page 19, Section IV., lines 7 through 10, the third sentence of text and the case citation

sentence immediately following are deleted; footnote 11 on page 19 is also deleted.

For the Court – By Direction

/s/ Patricia S. Connor
Clerk

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1247

QUINTON BROWN; JASON GUY; RAMON ROANE; ALVIN SIMMONS; SHELDON SINGLETARY; GERALD WHITE; JACOB RAVENELL,
individually and on behalf of the class they seek to represent,

Plaintiffs – Appellants

v.

NUCOR CORPORATION;
NUCOR STEEL BERKELEY,

Defendants – Appellees

Appeal from the United States District Court for the District of South Carolina, at Charleston. C. Weston Houck, Senior District Judge. (2:04-cv-22005-CWH-GCK)

Argued: January 27, 2009 Decided: August 7, 2009

Before MICHAEL, GREGORY, and AGEE, Circuit Judges.

Vacated and remanded with instructions by published opinion. Judge Gregory wrote the opinion, in which Judge Michael joined. Judge Agee wrote a separate opinion concurring in part and dissenting in part.

COUNSEL

ARGUED: Robert L. Wiggins, Jr., WIGGINS, CHILDS, QUINN & PANTAZIS, P.C., Birmingham, Alabama, for Appellants. Earle Duncan Getchell, Jr., MCGUIREWOODS, L.L.P., Richmond, Virginia, for Appellees. ON BRIEF: Armand Derfner, D. Peters Wilborn, Jr., DERFNER, ALTMAN & WILBORN, Charleston, South Carolina; Ann K. Wiggins, Susan Donahue, WIGGINS, CHILDS, QUINN & PANTAZIS, P.C., Birmingham, Alabama, for Appellants. Cary A. Farris, Marc Patton, ALANIZ & SCHRAEDER, L.L.P., Houston, Texas; Erin M. Sine, MCGUIREWOODS, L.L.P., Richmond, Virginia; John S. Wilkerson, III, Nosizi Ralephata, TURNER, PADGET, GRAHAM & LANEY, P.A., Charleston, South Carolina, for Appellees.

OPINION

GREGORY, Circuit Judge:

This case involves allegations of racial discrimination at a steel manufacturing plant in Huger, South Carolina, owned by Nucor Corporation and Nucor Steel Berkeley (collectively, "Nucor"). We find that the district court abused its discretion and erred as a matter of law in denying class certification to the plaintiffs-appellants. We therefore vacate the order and remand the case to the district court for certification.

I.

The allegations that the appellants present in support of their racial discrimination and hostile

work environment claims speak for themselves: white supervisors and employees frequently referred to black employees as "nigger," "bologna lips," "yard ape," and "porch monkey." White employees frequently referred to the black employees as "DAN," which stood for "dumb ass nigger." These racial epithets were broadcast over the plant-wide radio system, along with "Dixie" and "High Cotton." Monkey noises were also broadcast over the radio system in response to the communications of black employees. The display of the Confederate flag was pervasive throughout the plant, and items containing Nucor's logo alongside the Confederate flag were sold in the plant's gift shop. Additionally, several e-mails that depicted black people in racially offensive ways, such as by showing them with nooses around their necks, were circulated by various employees. Once, an employee held up a noose and told a black co-worker that it was for him.

The plant is organized into six production departments: beam mill, hot mill, cold mill, melting, maintenance, and shipping. When a job opening at the plant becomes available, the position is advertised over a plant-wide posting and bidding system controlled by the central personnel department. Employees are allowed to bid on positions in any department. Although, by policy, the plant's general manager approves all promotions and handles discrimination and harassment investigations, the record suggests that each department manager has unbridled discretion to make promotions within his department utilizing whatever objective or subjective factors he wishes. There were no black supervisors until after the institution of the Equal Employment Opportunity

Commission charges that preceded this litigation. Indeed, a white supervisor testified that his department manager—who wore a Confederate flag emblem on his hardhat—told him that he would never promote a black employee to supervisor. (J.A. 1066, 1885-86.)

The present litigation arose on August 25, 2004, when seven black employees at the plant, along with employee-plaintiffs at plants owned by Nucor in other states, brought suit under 42 U.S.C. § 1981 (2000) and Title VII of the Civil Rights Act of 1964 in the U.S. District Court for the Western District of Arkansas on behalf of themselves and approximately one-hundred other past and present black employees at the plant. At the time the litigation commenced, there were 611 employees working at Nucor's South Carolina plant, of whom seventy-one were black. The Western District of Arkansas severed the case and transferred the claims brought by the seven plaintiffs in South Carolina to the District of South Carolina. The appellants seek a permanent injunction, back pay, compensatory and punitive damages, and attorney's fees.

On May 7, 2007, the appellants filed a motion for class certification alleging:

> (1) A pattern or practice of disparate treatment against African-American employees with respect to promotion opportunities at the plant; (2) Nucor's promotion procedure, which allows white managers and supervisors to use subjective criteria to promote

> employees, has a disparate impact on African-American employees who apply for promotions, and (3) Nucor requires African-American employees to work in a plant-wide hostile work environment.

(J.A. 8980.) The district court denied class certification, and the would-be class plaintiffs now appeal.

II.

We review the district court's certification decision for abuse of discretion. *Doe v. Chao*, 306 F.3d 170, 183 (4th Cir. 2002), *aff'd on other grounds*, 540 U.S. 614 (2004). "[A] Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982).

III.

Rule 23(a) of the Federal Rules of Civil Procedure provides the following:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
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> (1) the class is so numerous that joinder of all members is impracticable,
>
> (2) there are questions of law or fact common to the class,

> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

In our review of these factors, we bear in mind that

> the final three requirements of Rule 23(a) "tend to merge," with commonality and typicality "serving as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence."

Broussard v. Meineke Discount Muffler Shops, 155 F.3d 331, 337 (4th Cir. 1998) (quoting *Falcon*, 457 U.S. at 157 n.13) (alteration in original). Indeed, "[c]ertification is only concerned with the commonality (not the apparent merit) of the claims and the existence of a sufficiently numerous group of persons who may assert those claims." *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 332-33 (4th Cir. 1983).

The district court below considered each of the Rule 23(a) requirements in turn, and we shall do the same.

A.

First, regarding numerosity, the district court found that the appellants satisfied the requirement because there were ninety-four black employees who worked at the plant from 2001 through 2004. Nucor argued that because only nineteen of these employees bid on positions from 2001 to 2006, the numerosity requirement had not been met. However, the district court held that the other black employees should be counted in the class because "potential applicants are eligible to prove that they would have applied for a promotion but for the discriminatory practice." (J.A. 8994.) Appellees do not challenge this finding, and we therefore presume it to be correct.

B.

Second, on commonality, the district court ruled against the appellants. The court reasoned that subjectivity in decision-making alone was insufficient to establish a disparate impact claim, discredited the statistical evidence presented in support of the disparate impact claim, and rejected the hostile work environment claim. We find that the district court improperly discounted the appellants' direct evidence, which, alone, was sufficient to establish commonality. Moreover, the district court improperly excluded the appellants' alternative benchmark for missing employment data and therefore erred in finding their statistical calculations to be insufficient to establish commonality. Finally, the district court erred in finding an insufficient basis for commonality on the hostile work environment claim.

1.

This Court has noted before that allegations of "a practice of disparate treatment in the exercise of unbridled discretion . . . rais[es] questions of law and fact common to all [subject] black employees." *Lilly*, 720 F.2d at 333. The Fifth Circuit reasoned similarly in *Shipes v. Trinity Industries*, 987 F.2d 311, 316 (5th Cir. 1993):

> The threshold requirements of commonality and typicality are not high; Rule 23(a) requires only that resolution of the common questions affect all or a substantial number of the class members. Allegations of similar discriminatory employment practices, such as the use of entirely subjective personnel processes that operate to discriminate, satisfy the commonality and typicality requirements of Rule 23(a).

(internal citation omitted). In *Lilly*, we further concluded that statistical evidence is unnecessary to establish commonality:

> [P]laintiffs need not, at the time of the motion for class certification, demonstrate by statistical evidence that blacks have been terminated [or promoted] at a higher rate than have whites, or any other differential. Certification is only concerned with the commonality (not the apparent merit) of the claims and the existence of a

> sufficiently numerous group of persons who may assert those claims . . . .

Lilly, 702 F.2d at 332-33.

The district court determined that the appellants' statistics were insufficient to establish commonality. Yet, the appellants have certainly presented compelling direct evidence of discrimination, such as denials of promotions when more junior white employees were granted promotions (J.A. 1004, 1017), denial of the ability to cross-train during regular shifts like their white counterparts (J.A. 1000, 1023), and a statement by a white supervisor that he would never promote a black employee (J.A. 1885-86). This evidence alone establishes common claims of discrimination worthy of class certification. *See Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 278 (4th Cir. 1980) (noting that class certification for a pattern-or-practice claim might be based on inferential, statistical, or direct evidence of discrimination). That the appellants also presented statistical data only strengthens their case.

The appellants have presented five statistical calculations in support of their discrimination claims,[1] but we need focus on only one. In order to

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[1] First, the appellants presented a calculation of the disparity in utilization rates at Nucor by comparing the average percentage of blacks in skill positions at the plant from 2000 to 2004 with the percentage of blacks in the surrounding population in 2000 who were qualified for the skill positions at the plant. In the surrounding area, blacks made up

demonstrate a disparity in job promotions, the appellants compared the estimated percentage of blacks who sought promotions between December 1999 and December 2003 with the estimated percentage of blacks who received promotions during that period. The former figure was 19.24%, and the latter figure was 7.94%. However, the appellants could not rely entirely on actual applicant data in making this calculation because Nucor has destroyed such data for promotion periods prior to 2001.[2] Instead, in an effort to establish an alternative

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38.2% of the population qualified to hold skilled positions. However, only 13.42% of the employees at the plant from 2000 through 2004 were black. The second calculation was the same as the first, except the appellants extended the time period to 2006 to demonstrate that the disparity continued.

To demonstrate a disparity in the number of job applications by black applicants, the third calculation compared the percentage of qualified blacks in the surrounding population in 2000 with the percentage of blacks who bid on plant promotions between 2001 and December 2003. The former percentage was 38.2, and the latter was 16. The fourth calculation is discussed *infra*. Finally, the fifth calculation compared the percentage of qualified blacks in the surrounding community in 2000 with the estimated percentage of blacks who received promotions from December 1999 to December 2003. The former figure was 38.2%, and the latter figure was 7.9%.

[2] We make no judgment regarding the propriety of Nucor's destruction of the data.

benchmark, the appellants, using change-of-status forms, identified twenty-seven positions filled during the 1999-2000 time period and extrapolated from that data using the assumption that the racial composition of the bidding pool for those jobs was the same as the weighted average of the racial composition of the bidding pools for the subsequent, post-2000 period.

Nucor provided selected promotions data for 2001 through 2006, and it argues that this data should have been used instead of the extrapolated 1999-2000 data because the appellants gathered the extrapolated data from the change of status forms, which do not indicate whether a position was open for bidding. The district court decided to exclude the appellants' pre-2001 data and Nucor's post-2003 data and rely solely on the data that Nucor provided for January 2001 through December 2003.[3] Although

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[3] Nucor complains that the appellants themselves have created an unduly restricted data set by excluding the promotions that occurred after the filing of their suit in 2004. However, post-lawsuit promotions would not enhance the accuracy of the data on Nucor's promotion practices. Indeed, such promotions would likely detract from their accuracy, since it is no secret that the institution of litigation often prompts companies to change their practices. These post-suit changes have only minimal weight with regard to the merits of the plaintiffs' claims. *See Holsey v. Armour & Co.*, 743 F.2d 199, 214 n.5 (4th Cir. 1984) ("We find no error in the fact that the district court minimized the significance of evidence of Armour's post-complaint hiring and promotion of black employees."). The district court found in the

the appellants argued that the 80% rule was the proper standard by which to evaluate their statistical evidence,[4] the district court determined that standard deviation analysis was the proper method by which to do so.[5] In its subsequent

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appellants' favor on this issue, which is why it did not utilize Nucor's post-2003 data, and we find no abuse of discretion in its doing so.

[4] The 80%, or four-fifths, rule "is an administrative rule of thumb used by agencies concerned with Title VII cases. It offers a definition of what is a serious difference in the passing rates for protected classes. If the selection rate for a protected class is less than 80% of the selection rate for the group selected at the highest rate, that constitutes adverse impact." *Chisholm v. U.S. Postal Serv.*, 665 F.2d 482, 495 n.22 (4th Cir. 1981).

[5] Standard deviation analysis considers the differences between expected and observed values—in this case, for example, the number of blacks promoted versus the number of blacks one would expect to be promoted based on their percentage in the relevant population (e.g., job applicants or the plant workforce). Standard deviation analysis is often viewed as superior to the 80% rule because it takes into account the natural fluctuations from the expected value that come with any random sample. In other words, for any given sample of black applicant data, an observed disparity might be the result of chance. The smaller the standard deviation, the more closely the data points are clustered around the mean (expected value), and the more likely the data points are the result of chance. "For example, if a coin were tossed ten times . . . and came up heads

assessment of the statistics, the district court found that the appellants had not proven a statistically significant disparity, and it therefore ruled against them on the commonality prong of their claims. The appellants argue that the district court's decisions were improper and negatively affected their statistics.

In another Title VII suit involving destroyed data, *United States v. County of Fairfax*, 629 F.2d 932 (4th Cir. 1980), Fairfax County destroyed its job applications for the 1974-77 period. "As a consequence, the government extrapolated the figures for 1974-77 from the 1978 applicant pool by assuming that the applicant pool for 1974-77 contained the same proportions of blacks and women as did the 1978 applicant pool." *Id.* at 940. The Court approved the use of this alternative benchmark and concluded that it was "the most salient proof of the County's labor market." *Id.*[6] In this case, since Nucor

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four times, no one would think the coin was biased (0.632 standard deviations), but if this same ratio occurred for a total of 10,000 tosses, of which 4,000 were heads, the result could not be attributed to chance (20 standard deviations)." *Lilly*, 720 F.2d at 336 n.17.

[6] The dissent does not argue with the underlying reasoning of *County of Fairfax*: when an employer destroys relevant employment data, the plaintiffs may utilize alternative benchmarks to make up for this lost data. Certainly, the benchmarks will not be as good as the destroyed data themselves—that would be next to impossible to achieve. Nevertheless, the plaintiffs should not be

destroyed the pre-2001 job promotions data, the appellants likewise were free to attempt to utilize an alternative benchmark in order to form their calculations, and the district court abused its discretion in ruling that only the data that Nucor provided could be used.[7] The appellants should not

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penalized by the destruction (however innocent) of such data. Any factual differences between the cases do not overcome this underlying reasoning:

First, the fact that there is only one year of missing data in this case is inapposite—the point is that a year of relevant data has been destroyed, and that destruction should not be used to weaken the appellants' case. Likewise, the absence of a statutory duty upon Nucor to maintain any data does not imply a judicial bar from allowing the appellants to approximate the destroyed data in making their claim. Finally, we certainly do not agree with the dissent's insinuation that, because this case involves promotions and not hiring, the appellants are less entitled to data (and approximations thereof) to support their claims. The dissent is correct, and should itself remember, that we are not reviewing the merits of this case, and the district court was simply incorrect to exclude all evidence of the 1999-2000 promotions.

[7] The district court made the following determination in excluding the appellants' pre-2001 data: "Nucor provided the plaintiffs with records of promotions occurring in the plant from January 2001 to December 2003. Statistics based on actual data is [sic] more probative than statistics based on assumptions. Consequently, the Court relies on

be penalized because Nucor destroyed the actual pre-2001 job promotions data.[8]

The question before the district court was not whether the appellants have definitively proven disparate treatment and a disparate impact; rather, the question was whether the basis of appellants' discrimination claims was sufficient to support class certification. *See Lilly*, 720 F.2d at 332. In excluding the appellants' data, the district court ruled, "These assumptions [regarding the 1999-2000 data] may be reasonable and the statistics based thereon may be relevant to prove discrimination at the plant. However, the necessity of the assumptions diminishes their probative value." (J.A. 8985.) Yet, evidence need not be conclusive to be probative, and even evidence that is of relatively weak probative value may be useful in meeting the commonality requirement.

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statistics resulting from an analysis of this data." (J.A. 8985.)

[8] In response to appellants' argument that the district court should have compelled Nucor to provide more data during discovery, Nucor argues that the appellants cannot appeal a discovery order under FRCP 23(f). We agree with the Eleventh Circuit that "jurisdiction granted by Rule 23(f) does not extend to [a] separate [discovery] order." *DeLeon-Granados v. Eller & Sons Trees, Inc.*, 497 F.3d 1214, 1218 n.1 (11th Cir. 2007). We therefore express no opinion at this time regarding the district court's decision not to compel Nucor to produce additional data.

With the 1999-2000 data included, the record indicates that the appellants' statistics would be significant at greater than two standard deviations.[9] The appellants have therefore presented valid statistical evidence that independently indicates a disparate impact and disparate treatment in job promotions at Nucor, and we reiterate that an in-depth assessment of the merits of appellants' claims at this stage would be improper. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974); *Thorn v.*

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[9] The Supreme Court has indicated that anything greater than two or three standard deviations in racial discrimination cases is suspicious. *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 n.14 (1977); *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977). We will presume that two standard deviations is the proper threshold for this case, but we reserve the unanswered question of whether this rule should be limited to large sample sizes. With the 1999-2000 data excluded, the appellants' promotion data demonstrated a disparity resulting in only 1.48 standard deviations—below the Supreme Court's threshold. With the data included, however, the appellants indicate that their calculations yielded 2.54 standard deviations.

For our purposes, a threshold of two standard deviations corresponds roughly to a 95% confidence level or a .05 level of significance, i.e., there is only a 5% probability that the result is due to chance. Three standard deviations would equate to a 99.7% confidence level. *See generally* Bruce J. Chalmer, *Understanding Statistics* 97-98 (1987); Wikipedia, Standard deviation, http://en.wikipedia.org/wiki/Standard_deviation (last visited June 19, 2009).

Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 319 (4th Cir. 2006). We therefore find that the appellants' calculations based on their alternative benchmark were adequate to establish commonality."[10]

In summary, because the appellants' direct evidence alone was sufficient to demonstrate common claims of disparate treatment and disparate impact, their statistical data did not need to meet a two-standard-deviation threshold, and the district court erred as a matter of law in requiring them to do so. Yet, we further find that the district court abused its discretion when it excluded the appellants' alternative calculations of the destroyed pre-2001 promotions data. With this data included, the appellants' statistics were independently sufficient to meet the Rule 23 commonality

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[10] The dissent takes issue with our crediting the appellants' statistics. However, we emphasize that at this stage, we are dealing only with whether the appellants have presented sufficient statistical information to establish commonality. We must walk a fine line between a facial class certification assessment and an assessment on the merits, and the dissent has stepped to the other side. The dissent's critiques might very well discredit the appellants' statistics later, upon a full review of the merits, but the information that the appellants have presented is enough to allow them to get to that point. Our crediting the statistics certainly does not portend the opening of any class certification floodgates. There are many requirements for class certification, and our decision today respects that fact.

requirement. We therefore conclude that the appellants satisfied the commonality requirement for their discrimination claims, and the district court should have found in the appellants' favor on this portion of their motion. *See Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 293 (2d Cir. 1999) ("More detailed statistics might be required to sustain the Plaintiffs' burden of persuasion, but [these statistics], in conjunction with the anecdotal evidence, satisfy] the Class Plaintiffs' burden of demonstrating commonality for purposes of class certification." (internal citation omitted)).

2.

The district court also discounted the sixteen affidavits that the appellants presented in support of their pattern-or-practice and hostile-work-environment claims because only two of the affiants were in departments other than the beam mill department. The district court found that this concentration precluded the establishment of a pattern or practice of discrimination. It reached a similar conclusion on the appellants' hostile work environment claim: "The plant's production departments can be classified as separate 'environments.' A class members [sic] claim of a hostile work environment in the hot mill will vary significantly from a class member's claim of a hostile work environment in the beam mill." (J.A. 8989.)

The appellants challenge the district court's ruling by arguing that the court's "separate environments" analysis was flawed. The district court noted that "[t]he plaintiffs have presented plant-wide racist acts potentially experienced by

every African-American employee working at the plant when the acts occurred. These acts include: (1) racist e-mails, (2) display of the confederate flag, and (3) racist remarks over the plant radio." (J.A. 8988-89.) Yet, it then proceeded to classify the departments as unique environments.

The Supreme Court has held, "When the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 67 (1986)). This is essentially what the appellants argue: despite the formal classification of the plant into six production departments, the racist acts had plant-wide repercussions and affected all black employees. A hostile environment determination can be made "only by looking at all the circumstances." *Harris*, 510 U.S. at 23. Such circumstances include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.*; *accord Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002). The allegations made in the affidavits that the district court discredited should have factored into the totality-of-the-circumstances assessment of the plant as a whole.

In *Hill v. Western Electric Co.*, 596 F.2d 99, 102 (4th Cir. 1979), the Court held:

> A person who has been injured by unlawful, discriminatory promotion practices in one department of a single facility may represent others who have been injured by the same discriminatory promotion practices in other departments of the same facility. In such a case, the representatives of the class all have the same interests in being free from job discrimination, and they have suffered injury in precisely the same way in the denial of promotion.

In *Hill*, the Court determined that employees in one department could not be included in the class because they did all of their work off-site. *Id.* That is not the case here.

The appellees argue that Nucor's management provided "clear evidence" of "the decentralized nature of Nucor's practices." (Appellees' Br. 18.) However, the "clear evidence" they cite is itself contradictory on this matter. While the manager of the beam mill indicated that his department is "separate from the buildings and areas of other Nucor Steel Berkeley departments" (J.A. 7885), the melt shop manager and supervisor noted that their building "is attached to Beam Mill and Hot Mill" (J.A. 7896, 7917). Moreover, "Nucor Berkeley employees share a locker room with caster, caster maintenance, hot mill, melt shop maintenance, hot mill maintenance, as well as environmental." (J.A. 7896, 7917.) And as noted previously, racial slurs, monkey noises, and other offensive statements were broadcast over the plant-wide radio. Thus, there is

scant, if any, evidence that each of the departments is so autonomous as to justify classifying them as separate environments.

In light of the foregoing cases and facts, it was an abuse of discretion for the district court to find that the employees at the plant were separated into different environments. All of the employees worked at a single facility, in departments that were, at minimum, connected to each other, and employees shared several common areas. There is therefore sufficient evidence to indicate that all of the black employees were affected by the comments and actions of the white employees and supervisors in other departments. Thus, the affidavits of employees in one department are admissible to prove a plant-wide hostile environment that affected employees in other departments, and the plaintiffs have satisfied the commonality requirement for their hostile work environment claim. *See Halsey*, 743 F.2d at 216-17.

C.

The district court determined that in order for the appellants to prove typicality for their disparate treatment claim, they would have to satisfy the framework set forth in *McDonnell Douglas*, 411 U.S. 792. However, because the court found that the plaintiffs had not demonstrated a pattern or practice of discrimination, it held that the attempts by the individual plaintiffs to demonstrate disparate treatment would not be typical of the attempts of the other class members to do so. Moreover, the district court found that because the plaintiffs had not demonstrated a disparity in black promotion rates, their disparate impact claims also would not be

typical of the class. Finally, the district court found that the named plaintiffs' hostile work environment claims were not typical of the claims of class members outside of the beam mill.

As noted previously, the district court abused its discretion in its rulings on the appellants' disparate treatment, disparate impact, and hostile work environment claims; therefore, it was also an abuse of discretion for the district court to base its typicality conclusion on these rulings. Moreover, as we noted *supra*, commonality and typicality "tend to merge," *Broussard*, 155 F.3d at 337, and the appellants have presented sufficient evidence to satisfy the threshold typicality requirement of Rule 23(a).

D.

Finally, regarding adequacy, the district court found the plaintiffs not to be adequate representatives for the disparate treatment and disparate impact claims. However, the court could "discern no conflicts of interest among the plaintiffs and class members regarding hostile work environment claims." (J.A. 8993.) Given the above conclusions that we have reached regarding the appellants' disparate treatment and disparate impact claims, we also find that the district court's assessment of the adequacy factor with regard to these claims was an abuse of discretion.

To the extent that the district court was correct that the putative class representatives have a conflict with the class in terms of competition for promotions, this conflict should not defeat class

certification. Indeed, if this were true, how might a class action challenging promotion practices ever be brought—unless the EEOC deems fit to do so—when the plaintiffs seek instatement into previously denied positions? The appellees point to *General Telephone Co. of the Northwest v. EEOC*, 446 U.S. 318 (1980), but that case is to no avail. There, the Supreme Court simply "note[d]" as an "example" that "[i]n employment discrimination litigation, conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority. Under Rule 23, the same plaintiff could not represent these classes." *Id.* at 331. Setting aside the question of whether this language was meant to be controlling, it plainly does not apply to this case, which deals with promotions and not the competition for "fringe benefits or seniority" posed by new hires.

The district court can address plaintiffs' claims for injunctive or other relief after liability and other common issues are determined. *See* Fed. R. Civ. P. 23(c)(5); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 361-62 (1977) ("[A]s is typical of Title VII pattern-or-practice suits, the question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination. The force of that proof does not dissipate at the remedial stage of the trial."); *Hill*, 672 F.2d at 387 ("Bifurcation of Title VII class action proceedings for hearings on liability and damages is now commonplace . . . ."). If, at the second stage of the proceeding, conflicts need to be resolved with regard to promotions, the district court can do so then. *See*

Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 429 (4th Cir. 2003) ("[T]he need for individualized proof of damages alone will not defeat class certification."); *Pettway v. Am. Cast Iron Pipe Co.*, 576 F.2d 1157, 1178 (5th Cir. 1978). Of course, certification is conditional, and should the conflicts prove intractable at the second stage, the district court may simply decertify the class. *See In re Sch. Asbestos Litig.*, 789 F.2d 996, 1011 (3d Cir. 1986). But at this stage of the proceedings, we find that the appellants are adequate representatives for the disparate impact and treatment claims of the putative class.

As noted previously, the district court found the appellants to be adequate representatives for the hostile work environment claim. The appellees do not dispute this finding, and we find no abuse of discretion in the district court's so concluding.

IV.

Our review of the district court's assessment of the Rule 23(a) factors leads us to conclude that the court abused its discretion in denying class certification. Given our consideration above, we find that the class certification requirements of Rule 23(a) have been satisfied with regard to the appellants' disparate impact, disparate treatment, and hostile work environment claims. We therefore vacate the district court's denial of the appellants' motion for class certification, and we remand the case to the district court with instructions to certify the appellants' class action and to engage in further proceedings consistent with this opinion.

VACATED AND REMANDED WITH INSTRUCTIONS

AGEE, Circuit Judge, concurring in part and dissenting in part:

I.

I concur in the majority opinion as to Section III(A) (the district court's determination on the numerosity factor), that portion of Section III(B)(2) reversing the district court's judgment as to the hostile work environment claim concerning the commonality factor,[1] that portion of Section III(C) as to the typicality factor for the hostile work environment claim only, and Section III(D) reversing the district court's judgment as to the adequacy of

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[1] To the extent the district court's judgment was based upon a determination with regard to Sections III(B)(2) and (C) that the appellants' hostile work environment claim did not have common questions of law or fact or was not typical of the class because the evidence showed separate, unconnected work environments, that determination is not supported by the record. While Nucor's evidence shows *its* operation of the plant departments was distinct and separated among the departments, that evidence is not probative as to the effects of the alleged acts on the employees' working environment across the whole facility. However, should Nucor adduce relevant evidence on the merits showing distinct and unconnected work environments as affects the appellants and other employees, the district court may take such further action as Rule 23(c)(1)(C) permits.

representation.[2] However, because I believe the majority opinion fails to adhere to the standard of review and usurps the role of the district court, I respectfully dissent as to sections III(B)(1), (2), and III(C) regarding the commonality and typicality factors for the disparate treatment and disparate impact claims. For the following reasons, I would affirm the district court's judgment not to grant class certification as to those claims.

II.

"We review the district court's certification decision for abuse of discretion." *Gregory v. Finova Capital Corp.*, 442 F.3d 188, 190 (4th Cir. 2006) (citing *McClain v. S. C. Nat. Bank*, 105 F.3d 898, 902 (4th Cir. 1997)). It is the party seeking class certification who bears the burden of proving the requirements of Rule 23. *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001); *Int'l Woodworkers of Am. v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1267 (4th Cir. 1981). "A court has broad discretion in deciding whether to allow the maintenance of a class action." *Roman v. ESB, Inc.*, 550 F.2d 1343, 1348 (4th Cir. 1976).

> A district court has abused its discretion if its decision "is guided by erroneous legal principles" or "rests upon a clearly erroneous factual

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[2] I also concur in the holdings represented by footnote 4, that the district court did not abuse its discretion in excluding post-2003 promotion data, and footnote 8, that Rule 23(f) did not permit interlocutory appeal of the discovery order.

> finding." *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999). We do not ask whether we would have come to the same conclusion as the district court if we were examining the matter *de novo*. *Fellheimer, Eichen & Braverman, P.C. v. Charter Techs.*, 57 F.3d 1215, 1223 (3d Cir. 1995). Rather, after reviewing the record and the reasons the district court offered for its decision, we reverse for abuse of discretion if we form "a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Westberry*, 178 F.3d at 261.

Morris v. Wachovia Sec., Inc., 448 F.3d 268, 277 (4th Cir. 2006); *see also Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 317 (4th Cir. 2006) ("A district court per se abuses its discretion when it makes an error of law or clearly errs in its factual findings.").

In the class certification context of Rule 23, our decisions have specifically acknowledged that there is no abuse of discretion, as a matter of law, when a reasonable jurist could have made the decision at issue based on the evidence in the record.

> [A] great deal of deference must be afforded to a District Court's decision to deny certification of a plaintiff class for a class action. Indeed, even if reasonable persons can disagree as to whether the class certification was

> proper, the District Court's decision certainly does not amount to an abuse of discretion.

Simmons v. Poe, 47 F.3d 1370, 1381-82 (4th Cir. 1995). "[W]e cannot hold that the district court's refusal to expand the class . . . was an abuse of discretion, though reasons clearly existed for taking the other course, and taking it surely would not either have abused discretion." *Lewis v. Bloomberg Mills, Inc.*, 773 F.2d 561, 564 (4th Cir. 1985).

On appeal from an order granting or denying certification, the appellate court does not reweigh the evidence *de novo*, but is to accord the district court's decision "broad discretion." *See Lienhart*, 255 F.3d at 146 (Within the framework of Rule 23 "[a] district court has broad discretion in deciding whether to certify a class." (internal quotations omitted)).

At its core, the district court determined the appellants could not meet either the commonality or typicality factors for certification under Rule 23(a) because they failed to meet their burden of proof as to the direct or statistical evidence of discriminatory promotions. The record in this case reflects the district court's judgment was neither "guided by erroneous legal principles" nor grounded "upon a clearly erroneous factual finding." Thus, when the full context of the appellants' proffered evidence is examined and the standard of review is observed, the district court cannot be said to have abused its discretion in denying certification because a reasonable jurist could have reached that decision on this record.

While the majority opinion is correct that a certification determination is not a judgment on the merits of the underlying claims, neither is it a pleadings-based determination that can be verified by any evidence, no matter how deficient. Certainly since the United States Supreme Court's decision in *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982), district courts have been *required* to undertake a "rigorous analysis" not just of the plaintiffs' claims as pled, but of the evidence to support those claims in order to make an appropriate judgment on Rule 23 certification. 457 U.S. at 161 ("[A] Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."). "[S]ometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Id.* at 160.

In the case at bar, the district court followed its duty and performed that rigorous analysis, although with a result that the majority may not have reached if they were sitting as the trier of fact. This Court has been clear in explaining that an objection to examining the merits of a class certification claim, as reflected by the majority opinion's citation to *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), *supra* at 12-13, was rendered invalid after *Falcon*. The district court's role, and ours, as explained in *Gariety v. Grant Thornton, LLP*, 368 F.3d 356 (4th Cir. 2004), is telling:

> If it were appropriate for a court simply to accept the allegations of a complaint at face value in making class action

findings, every complaint asserting the requirements of Rule 23(a) and (b) would automatically lead to a certification order, frustrating the district court's responsibilities for taking a "close look" at relevant matters, *Amchem*, 521 U.S. at 615, 117 S.Ct. 2231, for conducting a "rigorous analysis" of such matters, *Falcon*, 457 U.S. at 161, and for making "findings" that the requirements of Rule 23 have been satisfied, *see* FED. R. CIV. P. 23(b)(3). Moreover, if courts could only consider the pleadings, then "parties would have wide latitude to inject frivolous issues to bolster or undermine a finding of predominance." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1269 (2002).

When Rule 23(c), which originally required certification orders to be made "as soon as practicable after commencement of [the] action," was amended in 2003 to require the court to determine class certifications "at an early practicable time," the Advisory Committee on Civil Rules explained the preexisting and longstanding practice that prompted the change:

> Time may be needed to gather information necessary to make the certification decision.

> Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. *In this sense, it is appropriate to conduct controlled discovery into the "merits," limited to those aspects relevant to making the certification decision on an informed basis.*

FED. R. CIV. P. 23 advisory committee's note to 2003 amendments (emphasis added).

The *Eisen* decision, upon which the district court relied, does not require a court to accept plaintiffs' pleadings when assessing whether a class should be certified. In *Eisen*, the Supreme Court held that the district court's preliminary hearing *on the merits of the case*—concluding that the plaintiff was "more than likely" to prevail—was inappropriate for the purpose of determining whether a class action could be maintained. 417 U.S. at 177-78, 94 S.Ct. 2140. *Eisen* simply restricts

a court from expanding the Rule 23 certification analysis to include consideration of whether the proposed class is likely to prevail ultimately on the merits. *See Castano*, 84 F.3d at 744; 5 Moore's Federal Practice 23.84[2][a] (3d ed. 2003). As the Supreme Court itself stated in a post-*Eisen* case, "sometimes it may be necessary for the [district] court to probe behind the pleadings before coming to rest on the certification question." *Falcon*, 457 U.S. at 160; *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469, 102 S.Ct. 2364 (1978) ("[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action" (internal quotation marks omitted)).

Thus, while an evaluation of the merits to determine the strength of plaintiffs' case is not part of a Rule 23 analysis, the factors spelled out in Rule 23 must be addressed through findings, even if they overlap with issues on the merits. *Eisen's* prohibition against assessing plaintiffs' likelihood of success on the merits as part of a Rule 23 certification does not mean that consideration of facts necessary to a Rule 23 determination is foreclosed merely because they are required to be proved as part of the merits. The analysis under Rule 23 must focus on the

> requirements of the rule, and if findings made in connection with those requirements overlap findings that will have to be made on the merits, such overlap is only coincidental.

368 F.3d at 365-66.

The majority's citation to *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311 (4th Cir. 2006), is also puzzling, as this post-*Gariety* decision acknowledged the type of inquiry undertaken by the district court in the case at bar:

> At the class certification phase, the district court must take a "close look" at the facts relevant to the certification question and, if necessary, make specific findings on the propriety of certification. *Gariety*, 368 F.3d at 365 (internal quotations omitted). Such findings can be necessary even if the issues tend to overlap into the merits of the underlying case. *Falcon*, 457 U.S. at 160.

Thorn, 445 F.3d at 319.

Thus, the district court's examination and evaluation of the plaintiffs' evidence to support the class certification claim was not only appropriate, but required under *Falcon* and *Gariety*. That the majority would have reached a different conclusion, albeit lacking all the advantages of the district court's first-hand knowledge of the case, establishes nothing because the standard of review goes to what

a reasonable jurist could have found, which may very well lead to differing views on the same set of facts. *See Morris*, 448 F.3d at 277 ("We do not ask whether we would have come to the same conclusion as the district court if we were examining the matter *de novo*.") (citing *Fellheimer, Eichen & Braverman, P.C. v. Charter Techs.*, 57 F.3d 1215, 1223 (3rd Cir. 1995)).

In my view, the majority opinion steps beyond the standard of review and improperly reweighs the evidence so as to achieve a certification that was properly within the district court's discretion to deny. The majority appears to sanction a rule of mandated class certification even where a reasonable jurist could properly find the named plaintiffs' evidentiary basis was insufficient. Such a result is not consonant with the appellate standard of review.

III.

The majority opinion initially rests on the conclusion that the appellants' direct evidence alone was sufficient to require class certification of the claims for disparate treatment and disparate impact. *Supra* at 6-7. I agree with the majority opinion that direct evidence could be sufficient, in a proper case, to support a certification decision without corollary statistical proof, although that is not a common practice in at least the disparate impact context. Nonetheless, the majority's conclusion — that the direct evidence alone was sufficient to merit certification — seems an odd decisional basis because that argument was not made by the appellants in the district court. Neither the

appellants' Statement of Issues, briefs or oral argument raised, as a point of error, the failure of the district court to grant certification on the basis of direct evidence *alone*.

The appellants' argument below was that the direct evidence "bolstered" their main evidentiary claim, which was their statistical analysis. *See, e.g.*, J.A. 965 ("The plaintiffs have also bolstered the statistical evidence of a pattern or practice of subjective bias with both direct and anecdotal evidence of actual racial bias by the promotion decision-makers . . . .") (emphasis added); J.A. 8473 ("The commonality and typicality of plaintiffs' pattern-or-practice claim is further bolstered by the subjective nature of the interview and selection stage of Nucor's promotion process.") (emphasis added); Br. of Appellant at 37 ("Plaintiffs did not rely on the mere existence of a subjective promotion procedure, but presented a combination of statistical, anecdotal and direct evidence showing that such procedure was racially discriminatory throughout the plant."). Nonetheless, as noted below, when the appellants' limited direct evidence is examined, a reasonable jurist could find that evidence failed to meet the appellants' burden of proof as to either commonality or typicality for the certification of a class of all African-American plant employees.

Similarly, the majority opinion appears to reweigh the evidence in order to sustain the appellants' statistical model. As noted below, the district court was within its proper exercise of discretion to accord the statistical evidence little or no weight in the class certification decision. A reasonable jurist, on this record, could find the

appellants' statistical evidence too speculative and lacking a proper foundation so as to be without evidentiary value in meeting the appellants' burden of proof.

A. The Direct Evidence

The appellants did not argue to the district court that their "direct evidence" was alone sufficient to support a finding of commonality or typicality for class certification under Rule 23. They presented direct evidence to "bolster" their statistical evidence, not as standalone proof for Rule 23(a) purposes. However, the appellants' choice of methodology is not the dispositive issue on appeal. What the standard of review should examine in this case is whether the district court, based on the direct evidence alone, could have reasonably found that evidence insufficient to meet the appellants' burden of proof on typicality and commonality for the proposed class. That a reasonable jurist could have also found the same evidence sufficient for certification is irrelevant to the abuse of discretion standard where the evidence also could support the opposite finding. It appears plain, on this record, that a reasonable jurist could have found, as the district court did, that the appellants' direct evidence (though considered as only supplemental evidence) was simply inadequate to meet their burden of proof.

Under Rule 23(a)(2) and (3), the appellants were required to prove there were "questions of law or fact common to the class" and "claims . . . of the representative parties are typical . . . of the class." FED. R. CIV. P. 23. The purported class, all former and current African-American employees of the

Nucor plant during the relevant time period, worked in all the plant's departments, which include at least the beam mill, hot mill, melt shop, cold mill and shipping departments. Thus, the appellants' claims must have common questions among the employees in all these departments and be typical of those claims. The appellants' direct evidence, however, could reasonably be determined as failing to meet the burden of proof for either commonality or typicality for the purported class.

The statements of the three affiants cited by the majority do claim race-based denials of promotions, the employment practice at issue in their disparate treatment and disparate impact claims. However, all three were employees only in the beam mill. While some of the appellants' declarations allege employment discrimination in other departments *as to them as beam mill employees*, they fail to do so as to non-beam mill employees.

The district court noted that of all the appellants' direct evidence, only two non-beam mill employees allege discrimination in another department. Even the statement alleging bias of a supervisor was a statement by the department manager in charge of the beam mill about employees in the beam mill.

> [T]he existence of a valid individual claim does not necessarily warrant the conclusion that the individual plaintiff may successfully maintain a class action. It is equally clear that a class plaintiff's attempt to prove the

> existence of a companywide policy, or even a consistent practice within a given department, may fail even though discrimination against one or two individuals has been proved.

Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 877-78 (1984) (characterizing the holding in *Falcon*); *see also Int'l Bd. of Teamsters v. United States*, 431 U.S. 324,336 (1977) (to prove a pattern or practice violation a plaintiff must "prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts" but must "establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice").

On this record, a reasonable jurist could conclude the appellants failed to meet their burden of proof to show common issues and typical claims between themselves, as employees in the beam mill seeking promotions, and the workers in all the other departments who sought promotions. The appellants simply failed to produce that evidence.

The effect of this failure of proof, for certification purposes, is that the appellants failed to prove commonality or typicality for the non-beam mill employees they seek to represent. In that circumstance, a reasonable jurist, like the learned district court judge in this case, could find the appellants failed to show commonality or typicality for certification of a class consisting of all African-American plant employees. Accordingly, the district court acted within its discretion to deny class

certification on the basis of the appellants' direct evidence.[3]

B. Statistical Evidence

Nucor provided the appellants with actual promotion-related job posting and applicant data from January 2001 to February 2006.[4] According to the appellants' own expert, statistical analysis of this data resulted in a standard deviation of -.84, a result indicating no statistically significant disparity in the actual versus expected percentage of African-American employees successfully bidding on jobs. J.A. 5872-73. The appellants, however, objected to use of the 2001 to 2006 time period because it included job posting and bidding information

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[3] If the purported class was only beam mill employees, it may well have been an abuse of discretion not to certify the promotion claims (ignoring the numerosity factor). However, that was not the proposed class. The purported class in this case is all the plant's African-American employees and, for the reasons stated, the direct evidence is simply insufficient to find an abuse of discretion by the district court.

[4] The appellants' case is solely concerned with Nucor's actions on promotions within the South Carolina plant's internal workforce. Hiring or termination of employment is not at issue. Moreover, it is uncontested that promotions at the Nucor plant are only from within the existing workforce and the promotions at issue in this case are those subject to bid by employees.

occurring after suit was filed at the end of 2003.[5] The district court agreed and held "that the most reliable statistics are those gathered from [actual] promotion data occurring before this action was filed", and determined that "post-suit promotion data is entitled to minimal weight." J.A. 8986 n.4.

With the post-lawsuit data favorable to Nucor excluded from consideration, the appellants' experts calculated the actual versus expected standard deviation based on the actual job posting and bidding data from 2001 to 2003 as -1.48.[6] In other

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[5] The district court's opinion states that suit was originally filed on August 25, 2004. However, court records indicate that suit was originally filed against Nucor Steel on a company-wide basis in the Western District of Arkansas on December 8, 2003. That portion of the suit pertaining to discrimination claims at the Nucor-Berkeley plant at issue here was transferred to the District of South Carolina on August 25, 2004. J.A. 9007. The appellants then filed a Third Amended Complaint on January 28, 2005. J.A. 43.

[6] Our case law makes clear that standard deviation analysis is the proper method of statistical analysis. *See EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 647 (4th Cir. 1983), *rev'd on other grounds, sub nom. Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867 (1984) ("[W]e have adopted the rule that the proper method for determining 'legal significance' on the basis of statistical evidence is through the use of the standard deviation analysis. . . .") (citing *Moultrie v. Martin*, 690 F.2d 1078 (4th Cir. 1982)). The -1.48

words, the appellants were unable to produce statistically significant evidence of race discrimination in promotions based on actual job posting data.[7] *See Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977) (recognizing that differences between the expected value and the observed number greater than two or three standard deviations are significant); *Warren v. Halstead Indus., Inc.*, 802 F.2d 746, 759 n.17 (4th Cir. 1986) (recognizing that a standard deviation greater than two or three excludes "chance" as the cause of under-representation).

Since the appellants could not prevail based on the actual promotions data from 2001 through 2003, they sought to create additional data that would dilute the actual data analysis and produce the needed -2.00 or greater standard deviation. The appellants contended they could do so by comparing "the estimated percentage of blacks who sought promotions between December 1999 and December 2003 with the estimated percentage of blacks who received promotions during that period." *Supra* at 8.

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standard deviation resulted from data that controlled for two factors, the employees' training and discipline. When those two factors were not controlled, the standard deviation was calculated at 1.53, which the appellants' expert testified was not a statistically significant difference. J.A. 5857.

[7] The actual data from 2001 to 2003 came from "the posting notices of the jobs, the bids that were submitted by the individual employees, the prevailing bidder, and the personnel files and everybody that bid on those jobs." J.A. 9024.

However, their proposed data substitute (the "2000 data") was only estimated for 2000 because the bulk of the time period (from 2001 to 2003), reflected *actual* job postings for which African-American employees were known to have applied.[8] [9] The appellants contended to the district court that if their version of the promotion statistics for the 2000 through 2003 period (four years) was considered instead of three years (2001 to 2003), they could show the required standard deviation to make a prima facie case of discrimination. It is the appellants' means of creating the 2000 data that validates the district court's exercise of discretion in discounting that analysis because the 2000 data was without a valid foundation, purely speculative, and thus not entitled to probative weight. Even the

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[8] The majority opinion recites the additional time period for statistical information as "1999-2000." The actual period was December 9, 1999 to January 4, 2001, not quite 13 months. J.A. 1162 n.16-17. I refer to that December 9, 1999 to January 4, 2001 time period as simply "2000" to more accurately reflect the single year for which the appellants sought to create a statistical data substitute.

[9] As explained in more detail, *infra*, the "2000 data" consisted of 27 "change-of-status" forms for employment actions taken by Nucor from December 1999 to January 2001 and the appellants' resulting projection of the percentages of African-American employees who applied for the employment positions represented by the change-of-status forms during this timeframe and were not promoted.

appellants' own experts agreed the 2000 data suffered from significant infirmities.

Dr. Edwin Bradley, one of the appellants' statistical experts, stated that "[a]ll statistics involve a comparison between a benchmark of what was expected to occur and *what actually happened*." J.A. 404 (emphasis added). Thus, there were two variables that the appellants' experts, Dr. Bradley and Dr. Liesl Fox, needed to formulate as to what was expected to occur in 2000 and what actually happened: (1) the number of posted job promotions available for bidding by the existing Nucor employees during 2000, and (2) whether those job promotions were "similarly situated" as defined by the district court (i.e., job promotions for which at least one African-American employee applied). The assumptions required for both variables undermine the validity of the 2000 data.

In order to construct the first variable, the number of promotion positions available in 2000 open for employee bid, the appellants relied on twenty-seven "change-of-status" forms culled from the personnel files produced by Nucor. It is not clear from the record whether the twenty-seven change-of-status forms represent all, or only selected, jobs open for promotion in 2000 because these forms are not identified. Nucor argues that the change-of-status forms "are simply a company record which documents any employee's change of status, whether the employee was promoted, demoted, received a standard pay increase, or was transferred." Appellee's Br. at 36.

Indeed, the change-of-status forms found in the record for 2000 fail to bolster the appellants' claim that those forms reflect only promotion positions open to bid. For example, nine change-of-status forms appear in the record dated between December 1999 and January 2001 (including three in January 2001). J.A. 8397-99, 8406-07, 8416, 8673-74, 8701. Of these forms, one (J.A. 8399) simply reflects an increase in pay for an existing employee. Two (J.A. 8397, 8406) reflect completion of probation for an existing employee. Another (J.A. 8407), reflects a new hire and not a promotion. The remaining five reflect promotions of some type, though only one (J.A. 8673) identifies a promotion acquired through a bid process. On this record, it is difficult, if not impossible, to discern whether the 2000 data based on the nebulous change-of-status forms proves those positions were promotion positions available for employee bidding and thus relevant to the formulation of statistical evidence for the appellants' claims. Perhaps that is one reason the district court found *not* that the 2000 data represented twenty-seven positions reflecting promotion openings available for bidding but that "the plaintiffs searched through personnel files provided by Nucor and located twenty-seven *positions filled* between December 1999 and January 2001." J.A. 8984 (emphasis added).

But even if one assumes the twenty-seven change-of-status forms represented actual promotion openings in 2000, Nucor's expert, Dr. Finis Welch, testified "it is not known whether these were posted positions" (i.e. available for bid by employees). J.A. 5911 n.1. Thus, based on the record, or lack of it, to conclude that appellants established the first

variable necessary for their statistical analysis to verify the 2000 data is highly dubious.

For the second variable, whether the twenty-seven positions represent positions "similarly situated," Drs. Bradley and Fox assumed "that the racial composition of the bidding pool [applicants] for those jobs was the same as the weighted average of the racial composition of the bidding pools (applicants) for the" 2001-2003 period. *Supra* at 9; J.A. 8984. However, through its discovery orders the district court had defined "similarly situated" jobs to mean those on which an African-American employee actually bid. Drs. Bradley and Fox could only confirm that one of the twenty-seven "promotions" in the 2000 data involved an African-American employee actually bidding on the job.[10] J.A. 5853. Dr. Fox testified in her deposition as follows:

> Counsel: Okay. Now, what determine – what did you do to determine that these [27] job selections met the Court's definition of the same or similar?
>
> Dr. Fox: Job title.

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[10] In addition to Nucor's assertion that the twenty-seven change-of-status forms may not have represented a "promotion," Nucor also asserts that even if each change-of-status form represented a promotion, there is no way to know if the job was posted for bidding.

Counsel: Okay. How many of these job selections involved – these 27 job selections involved an African-American actually bidding on the job?

Dr. Fox: At least one.

Counsel: Okay. Other than the one, how many involved?

Dr. Fox: I don't know.

Counsel: You don't know. You have no way of knowing that?

Dr. Fox: No.

Counsel: Okay. Is not the definition of similarly situated, does that not also include a job on which an African-American actually bid?

Dr. Fox: That was the Court's order, yes.

Counsel: Okay. So have you made any attempt in your analysis of these 27 to bring them within the Court's definition of same or similar?

> Dr. Fox: Those were destroyed. It's not possible to do that.[11]

J.A. 5852-54. Instead, Dr. Bradley and Dr. Fox determined the jobs were "similarly situated" based on the similarity of the job title alone. J.A. 5854.

Dr. Welch criticized these assumptions because "it is not known whether . . . any African-American employees applied" for the twenty-seven job selections.[12] J.A. 5911 n.1. Dr. Welch also believed that "Drs. Bradley and Fox may have missed two selections of African-Americans into a job that is included in the posting data," and that there were "African Americans, including a named plaintiff, who moved into a job prior to 2001 that is a job held by employees at the time they won a position in the posting data." J.A. 5911-12 n.2,3.

Drs. Bradley and Fox also recognized that

> Bidding records [from 2001 to 2006] were provided only for "similarly situated" jobs for which at least one

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[11] The appellants proffered no evidence, from themselves or any other Nucor employee (past or present) that any African-American employee bid on any of the positions ostensibly represented by the 2000 data.

[12] Accordingly, Dr. Welch limited his analysis to "all of the job postings containing applicant information" because "[p]rior to 2001 we know neither the applicant mix regarding race nor do we know anything regarding qualifications." J.A. 5893.

> African-American bid. That means that any postings which were for "similarly situated" jobs but had no African-American bidders, and therefore all white bidders, were not included in our calculation. Thus, the African-American representation among bidders for "similarly situated" jobs provided by Nucor-Berkeley is necessarily inflated.

J.A. 583. According to Dr. Welch, this necessarily means that by applying the 2001 to 2003 weighted average of the bid pool applicants to the 2000 data, "they are *overstating* the expected number of African-American selections." J.A. 5912. In Dr. Welch's view, "there is no reason to assume that the applicant pools for each of [the twenty-seven] positions necessarily included at least one African American." J.A. 5912 n.4. Thus, the appellants' support in the record for the second variable, that the twenty-seven positions used to create the 2000 data were positions for which it could be legitimately assumed at least one African-American applied, is as dubious as the first variable.

The appellants certainly were entitled to proffer valid statistical evidence for 2000 upon which to expand the standard deviation analysis. That being said, however, no precedent or principle of law requires inherently unreliable evidence to be given evidentiary weight. The appellants chose a method of statistical proof, but based it on evidence a trier of fact could determine was inherently faulty.[13]

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[13] The district court's observations that the appellants' "assumptions may be reasonable and th

Consequently, a reasonable jurist could have determined the appellants failed to meet their burden of proof for the Rule 23(a) factors through the proffered statistical evidence. Accordingly, the district court did not abuse its discretion by failing to give the appellants' 2000 data, and the resulting standard deviation analysis, evidentiary weight and denying certification.[14]

IV.

Even if we assume that the 2000 data (and its resulting standard deviation analysis) was entitled to some evidentiary weight, the precedent cited by the majority opinion does not support the conclusion that the district court abused its discretion in refusing certification as to the disparate treatment and disparate impact claims. Our decision in *United States v. County of Fairfax*, 629 F.2d 932 (4th Cir. 1980), does not mandate that a district court must give evidentiary weight to every datum a prospective

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statistics based thereon may be relevant" means no more than it says. J.A. 8985. The district court, in context, was merely acknowledging the theoretical possibility that the appellants could present relevant evidence — a proposition disproved by the evidence they did present.

[14] Insomuch as neither the appellants' direct evidence or statistical evidence met the Rule 23 burden of proof, it was not an abuse of discretion to determine the two deficient forms of evidence could not, taken together, meet the appellants' burden of proof.

class representative presents just to increase the strength of their statistical proof.

Moreover, there are significant distinctions between the case at bar and *County of Fairfax*. A distinction of particular importance is that the "missing" data in *County of Fairfax* involved three out of the four years from which the statistical analysis was to be made. There was no credible basis in that case by which to use the one year of actual data to foster a valid analytical sample. One year's data was simply insufficient upon which to make a statistical analysis. *Accord EEOC v. Am. Nat'l Bank*, 652 F.2d 1176, 1195 (4th Cir. 1981). In contrast, the case at bar is the exact opposite, with three years of actual data. There is no precedent that requires a court in all cases to add an additional period of data, particularly data lacking in evidentiary credibility.[15] Moreover, Fairfax County, as a municipality, was under a statutory duty to maintain employment data in the 1970s, a duty which it failed to fulfill. No such duty is applicable to Nucor. *See County of Fairfax*, 629 F.2d at 937 n.4 ("In violation of the record keeping regulations of the Revenue Sharing Act and

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[15] The majority opinion seems to imply some bad purpose on the part of Nucor because the 2000 data on actual bid promotions was unavailable. Appellants have never made a spoliation of evidence claim or pointed to any legal duty on the part of Nucor to have maintained the precise records found absent. While appellants were certainly entitled to seek to create substitute data for 2000, nothing entitled them to a data substitute based on insufficient evidence and invalid assumptions.

the Crime Control Act, defendants had destroyed pre-1978 applications for employment.").

Another distinction is that *County of Fairfax* involved an appeal from the district court's judgment on the merits of the case, not a denial of class certification under Rule 23. Thus, the case at bar involves a different legal analysis and is subject to an abuse of discretion standard of review on appeal.

Further, although *County of Fairfax* involved claims of discrimination "in recruitment, hiring, assignments, and promotions," 629 F.2d at 936, the sufficiency of the applicant flow data in that case involved only the hiring data, not promotions data. Unlike hirings, which came from the surrounding community in *County of Fairfax*, Nucor only promotes from within its existing workforce. The data universe for hiring in *County of Fairfax* was thus much larger and without restricting variables that made projections on estimated data problematic. However, in the case at bar, the data universe contained restrictive variables limiting extrapolations because only current Nucor employees who were qualified and who in fact bid on a promotion could comprise that group.

County of Fairfax does not stand for the proposition that class certification claimants are entitled to a waiver of the rules of evidence for purposes of meeting their burden of proof. The district court's judgment was not based on erroneous legal principles and was thus not an abuse of discretion.

V.

When an appellate court reviews a trial court's determination upon an abuse of discretion standard, it must accord that court's factual conclusions supported by the record proper deference. *See United States v. Pittman*, 209 F.3d 314, 316 (4th Cir. 2000) (The abuse of discretion "standard of review mandates a significant measure of appellate deference to the judgment calls of trial courts."); *see also United States v. Mason*, 52 F.3d 1286, 1289 (4th Cir. 1995) ("Under the abuse of discretion standard, this Court may not substitute its judgment for that of the district court; rather, we must determine whether the court's exercise of discretion, considering the law and the facts, was arbitrary or capricious.").

This Court has recently stated that "[a]t its immovable core, the abuse of discretion standard requires a reviewing court to show enough deference to a primary decision-maker's judgment that the court does not reverse merely because it would have come to a different result in the first instance." *Evans v. Eaton Corp. Long Term Disability Plan*, 514 F.3d 315, 322 (4th Cir. 2008). Based on the record in this case, a reasonable jurist could plainly find the appellants' direct and statistical evidence failed to show commonality and typicality for the purported class sufficient to meet the certification threshold. As the district court's judgment was neither based on a "clearly erroneous factual finding" nor "erroneous legal principles," it should be accorded the deference due under the abuse of discretion standard of review.

In my view, the majority opinion fails to accord the district court proper deference in this case and, instead, reaches factual conclusions *de novo* that are not within the proper scope of review by an appellate court. The majority's opinion could reasonably be interpreted to require class certification so long as future plaintiffs seeking class certification can produce any data set exceeding two standard deviations without regard to the unreliability of that data or the process by which it was derived. Equally troubling is the prospect that certification is required no matter how attenuated and insufficient a plaintiff s direct evidence is shown to be. Such an extension of our case law ignores the prudent judgment and proper discretion of a district court, which has seen and heard the prolific evidence first-hand, and constrains the district court to a merely ministerial act devoid of evidentiary grounding. That result is incongruent with an appellate court's adherence to the standard of review for an abuse of discretion. I would thus affirm the district court's judgment denying class certification on the appellants' disparate impact and disparate treatment claims for the reasons set forth above, and respectfully dissent from the majority opinion in that regard.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 08-1247

QUINTON BROWN, et al.	)	
	)	
Appellants,	)	
	)	Appeal from the
	)	United States
	)	District Court for
	)	the District of
v.	)	South Carolina,
	)	Charleston
	)	Division
	)	
NUCOR CORPORATION, et al.	)	
	)	
Appellees.	)	

PETITION FOR REHEARING AND REHEARING *EN BANC* OF APPELLEES NUCOR CORPORATION AND NUCOR STEEL BERKELEY

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COUNSEL'S STATEMENT OF PURPOSE AND CERTIFICATION FOR REHEARING *EN BANC*

Appellees Nucor Corporation and Nucor Steel Berkeley, pursuant to Fed.R. App. P. 35 and 40, petition for rehearing *en banc* and in the alternative for panel rehearing, because the published opinion of the majority conflicts with the decision of the United States Supreme Court in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). The majority opinion also conflicts with the decision of this Court in *Gunnells v. HealthPlan Servs., Inc.*, 348 F.3d 417, 424 (4th Cir. 2003), *cert. denied*, 542 U.S. 915 (2004), as to the deference due district court class determinations on interlocutory appeal.

Furthermore, this case presents a question of exceptional importance with regard to the burden of proof placed on the party seeking class certification because the decision is, in petitioners' view, in conflict not only with *Windham v. Am. Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977) (*en banc*), *cert. denied*, 435 U.S. 968 (1978), and *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138 (4th Cir. 2001), but with decisions of other federal courts of appeals in *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221 (5th Cir. 2009), *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2009), and *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d 196 (2d Cir. 2008). The majority opinion likewise is contrary to *Broussard v. Meineke Discount Muffler Shops*, 155 F.3d 331 (4th Cir. 1998), because it requires a district court to use

disparate, non-common facts to create an imaginary "perfect plaintiff." These conflicts are not addressed in the majority opinion and require consideration by the full Court to secure and maintain uniformity of the Court's decisions.

The first matter of which your petitioners complain is the modification of the abuse of discretion standard. A true abuse of discretion review of the district court's decision not to certify a class for failure to satisfy the requirements of Fed. R. Civ. P. 23(a) would have ended once it became apparent that the evidence was in material conflict and that a reasonable judge could have been unpersuaded that the class requirements had been met. Instead, a discretion-eliminating bias in favor of certification has been established.

The majority holding that a prima facie showing compels certification is contrary to *Windham*, 565 F.2d at 64 n.6, and *Lienhart*, 255 F.3d at 146, as well as to recent cases of the Second, Third and Fifth Circuits holding that the proponent's burden on class certification is to prove the required elements of Rule 23 by a preponderance of the evidence, rejecting lower standards such as "some showing" or "threshold showing," analogous to the "facial assessment" standard applied by the majority here. When the proper standard is applied, the finder of fact is entitled to deference not accorded the district court by the majority opinion.

Equally unprecedented is the holding that satisfaction of Rule 23(a) with respect to the disparate impact, disparate treatment and hostile

work environment claims "inevitably leads us to conclude that the requirements of Federal Rule of Civil Procedure 23(b)(3) have also been satisfied for these claims." Slip Op., at 19. This ruling is contrary to *Amchem Prods., Inc.*, 521 U.S. 591, holding that the requirements of Rule 23(b)(3) are more stringent and far more demanding than the requirement of Rule 23(a)(2) for commonality, and that the federal courts are bound to apply the requirements of Rule 23 and lack authority to modify them. Because the district court has never considered Rule 23(b), the remand with instructions to certify is another discretion-destroying change in the law.

ARGUMENT

1. The Majority Opinion Creates an Asymmetrical Standard of Review in Which Class Certification Is Accorded Greater Deference than Denial of Certification.

In *Gunnells*, 348 F.3d at 424, the Court acknowledged the wide discretion that district courts have to certify or not to certify a class, noting that review is particularly deferential on interlocutory appeal. *Gunnells* held that, despite the potential for predominance and manageability problems in the certified class, where the district court had carefully analyzed Rule 23's requirements and made factual findings, "we cannot say at this interlocutory stage that the decision to conditionally certify a class action ... constitutes an abuse of discretion, particularly in light of the special deference due trial courts on this issue." 348 F.3d at 433. Here, when

certification was denied, no deference was afforded. Instead, the majority intruded on the role of the district court and reweighed the evidence. *See* Slip Op., at 26 (Agee, J., dissenting).

As the dissent points out, *id.* at 27, the majority's conclusion that appellants' direct evidence alone was sufficient to require certification of the claims for disparate treatment and disparate impact, Slip Op., at 6-7, was an argument never made by appellants either in this Court or below. When the majority held that the district court "improperly discounted the appellants' direct evidence, which, alone, was sufficient to establish commonality," Slip Op., at 6, *see also* Slip Op., at 13, its chosen language reveals disagreement with the weight afforded the evidence by the district court, rather than the identification of any error of law. The majority called Nucor's evidence "contradictory," Slip Op., at 15, and concluded that "there is scant, if any, evidence" to support the district court's conclusion that the different plant departments were separate environments. Slip Op., at 16. The majority held that there was "sufficient evidence" to indicate that all African-American employees were affected by the alleged discriminatory acts, and it was an abuse of discretion for the district court to find that the different departments of the plant were different work environments for purposes of commonality. *Id.*

The "scant, if any" formula conflates important legal distinctions. If there had been no evidence to support the district court's findings, an error of law could be found. However, where as here, there is disputed material evidence, deference is

owed. In *Lewis v. Bloomberg Mills, Inc.*, 773 F.2d 561, 564 (4th Cir. 1985), cited by the dissent, Slip Op., at 21-22, the Court recognized that reasons could exist for making either of two contrary decisions on a class certification issue without the court abusing its discretion.

Although the majority held that the district court "improperly excluded" appellants' alternative benchmark for missing employment data, Slip Op., at 6, appellants' evidence was never "excluded" in the sense that it failed to come into evidence. Instead, it was discounted as it was weighed by the district court. *See* Slip Op., at 11 n.7.

As the dissent observes, the actual data failed to show statistically significant evidence of racial discrimination in promotions. Slip Op., at 31 (Agee, J., dissenting). Appellants sought to create additional data that would dilute the actual data to produce a statistically significant result. *Id.* at 32. Even appellants' own experts agreed that the additional data suffered from "significant infirmities." *Id.* Under true abuse of discretion review, the district court was entitled to be unpersuaded. Yet, the majority held that the district court abused its discretion in failing to give conclusive weight to the substitute data.

It is one thing to say that "evidence need not be conclusive to be probative and even evidence that is of relatively weak probative value may be useful in meeting the commonality requirement." Slip Op., at 12. It is quite another then to conclude: "*We* therefore *find* that the appellants' calculations based

on their alternative benchmark were adequate to establish commonality." *Id.* at 12-13 (emphasis added). The majority's *de novo* review of the statistical evidence is a clear departure from established precedent.

If the published majority opinion stands, this Circuit will have an asymmetrical standard of review for class certification on appeal: "special deference" under *Gunnells* for decisions to certify a class, and no discretion to deny certification if there is evidence supporting certification, even evidence of "relatively weak probative value," as long as it makes out a *prima facie* case. But that is not the law, either in the eyes of the Supreme Court, or heretofore in this Circuit. Instead, the law is well-settled that there is no presumption, no bias, no thumb on the scale in favor of class certification. *See Amchem*, 591 U.S. at 620, 624; *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982); *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977); *Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 273 (4th Cir. 1980); *Windham*, 565 F.2d at 64 n.6.

The majority opinion enunciates no rule of law that would properly deprive the district court of its discretion to be unpersuaded on issues of fact. The failure of the majority opinion to apply the established standard of review with deference, by contrast, is based on an error of law contrary to controlling precedent.

2. If the Court Does Not Consider the Majority Opinion to Conflict with Existing Fourth Circuit Authority, Then that Opinion Opens a Circuit Conflict.

The majority held that, because appellants' direct evidence alone was sufficient to establish a *prima facie* case of commonality, the district court erred as a matter of law in even requiring statistical data. Slip. Op., at 13. The majority also held that it was an abuse of discretion to "exclude" the substitute statistical data generated by appellants' experts, even in light of the reliability problems cited by the dissent, because the evidentiary standard was "a facial class certification assessment," Slip Op. at 13 n.10, a lower evidentiary standard than that which is applied on the merits. *Id.*

The issue of the burden of proof in a class certification has become topical as a result of recent decisions in the Second, Third, and Fifth Circuits. All have held that the class proponent must establish the requirements of Rule 23 by a preponderance of the evidence. The decisions in *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221 (5th Cir. 2009), *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2009), and *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d 196 (2d Cir. 2008), demonstrate that the preponderance standard may have been more assumed than explicitly stated in earlier cases. In *Teamsters Local 445*, 546 F.3d at 202, the Second Circuit, acknowledging that its prior case law had been "less than clear," held that the

preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements, intending thereby to dispel any remaining confusion that the "some showing" or "preliminary finding" standards were applicable. *Id.*

The Third Circuit overruled a district court decision that required only a "threshold showing" that Rule 23's requirements were met, saying it was an inadequate and improper standard. *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 321. In *Alaska Elec. Pension Fund*, 572 F.3d at 228, the Fifth Circuit rejected the appellant's argument that the trial court erred in not applying the "reasonable trier of fact" standard, a substantially less stringent standard than preponderance. Citing both *Teamsters Local 445* and *In re Hydrogen Peroxide*, the Fifth Circuit held that its precedents foreclosed the position that the standard could be other than preponderance of all admissible evidence. *Id.* at 228-29.

Here, if a "facial assessment" standard, one that is capable of being satisfied by evidence conceded to be of "relatively weak probative value," *id.* at 12, is not deemed to be inconsistent with *Windham* and *Lienhart*, because those cases do not expressly mention preponderance, then the majority opinion has opened a circuit split. This in turn satisfies the exceptional public importance prong of the *en banc* standard. *See* Fed. R. App. P. 35(b)(1)(B).

3. The Majority's Conclusion that Meeting the Requirements of Rule 23(a) "Inevitably Leads" to Satisfying the More Stringent Requirements of Rule 23(b) is Contrary to Controlling Authority.

Even if the diminished burden were the law, it cannot justify the majority's holding that its assessment of the evidence under Rule 23(a) "inevitably leads us to conclude that the requirements of Federal Rule of Civil Procedure 23(b)(3) have also been satisfied for these claims." Slip Op., at 19. The Supreme Court in *Amchem* held that predominance requirement of Rule 23(b)(3) is more stringent than the commonality requirement of Rule 23(a)(2), 521 U.S. at 609, and far more demanding. *Id.* at 623-24.

In *Amchem*, 591 U.S. at 620, the Supreme Court held that the Rule sets requirements that the courts are bound to enforce, and the courts lack authority to modify them. *Id.* at 622. The party seeking certification must show that the action is maintainable under Rule 23(b)(1), (2) or (3). *Id.* at 624. But here, without any consideration of Rule 23(b), much less the requisite rigorous analysis, the majority vacated the decision below and remanded the case with instructions to certify a Rule 23(b)(3) class.

The case cited by the majority in support of its conclusion, *Pope v. R.R. Retirement Bd.*, 672 F.2d 972, 976 (D.C. Cir. 1982), Slip Op., at 19, does not

address the effect of a Rule 23(a) determination on the Rule 23(b) question. Here, no decision has been made, or even attempted, below to show that the requirements of Rule 23(b) are satisfied by a preponderance of the evidence. In fact, appellants did not even seek certification of a Rule 23(b)(3) class. Instead, they sought a Rule 23(b)(2) or hybrid (b)(2)-(b)(3) class. (*See* J.A. 8476.)

By remanding with peremptory instructions to certify a class, the majority has applied a standard not found in Rule 23, contrary to *Amchem*.

4. The Majority Opinion Conflicts with *Broussard*.

The facts that the majority opinion holds to be sufficiently common to support certification of a hostile work environment class were found by the district court to be so particularized and idiosyncratic as to require denial of certification. (J.A. 08989, 08991.) Heretofore, the Fourth Circuit has reversed class certification where separate allegations of individuals are pieced together to artificially strengthen the case. *Broussard*, 155 F.3d at 343-45. The majority opinion relies upon racial slurs, display of the Confederate flag, racist e-mails, and animal noises over the company radio as if each plaintiff should be able to use them in a common fashion. Under *Broussard*, plaintiffs are not entitled to "the practical advantage of being able to litigate not on behalf of themselves but on behalf of a perfect plaintiff pieced together for litigation." *Id.* at 345.

This raises the question whether the requirements of *Broussard* can be harmonized with

the decision below. Because an analysis of the fairness issue was required under *Broussard*, 155 F.3d at 343-45, the conclusion with respect to that issue was committed to the district court's discretion.

The district court considered this record over several years, received briefs, and heard oral argument on discovery issues, class certification, and appellants' motion for reconsideration of the class certification denial, all the while making factual determinations. The district court recognized and credited appellants' evidence of plant-wide racist acts potentially experienced by every African-American employee working at the plant when the acts occurred. (*See* J.A. 08988-99.) But in the end, the district court found that the acts were not common or typical enough, an issue committed by *Broussard* to the discretion of the trial court. 155 F.3d at 344. While the district court was not deciding merits issues, it was entitled to consider how thin, episodic, or idiosyncratic the anecdotal evidence was in deciding whether that evidence could fairly lend itself to class trial.

Certain allegations of frequent use by white supervisors of racial epithets, for example, *see* Slip Op., at 2, appear to be based on the affidavit and deposition of one non-African-American, non-party, former employee. Based on the affidavit and deposition (*see* J.A. 1075, 1839), the district court could reasonably have concluded that the use of the offending language did not fairly justify its use by all plaintiffs in a class context.

The majority opinion relied upon allegations that racist material was broadcast over the plant radio. Slip Op., at 3. However, because the plant's radio was, as befits a facility with 800 employees and multiple departments, a multi-channel walkie-talkie-type system (*see* J.A. 50451-05453), the district court was charged with exercising its discretion under *Broussard* to determine if the anecdotal evidence could fairly be used by all plaintiffs in a class setting. Significantly, appellants' own witnesses state clearly that there was no plant-wide radio system at Nucor Berkeley. (*See id.*; *see also* J.A. 4844, 4914-15.)

The same analysis applies to racial epithets such as "DAN." Slip Op., at 2-3. Although appellant Quinton Brown testified to this (J.A. 1013-14), of the other six appellants, Jacob Ravenell never heard the term. (J.A. 02995.) Appellant Gerald White says he never experienced it. (J.A. 03569.) Appellant Alvin Simmons heard second-hand about one incident involving someone else. (J.A. 02791-02792.) Appellant Ramon Roane had also only heard of incidents. (J.A. 01002.) And while it is true that three years before the lawsuit was filed, appellant Sheldon Singletary allegedly heard the term used two or three times in one conversation (J.A. 03964-03965), it is still true that the district court was required to use its discretion to determine whether such evidence in a class context could improperly create an imaginary "perfect plaintiff."

The same is true of the racist e-mails and claims with respect to clothing sales, sometimes based only on hearsay. (*See, e.g.*, J.A. 2206-09.)

Furthermore, while the majority finds that "several e-mails that depicted black people . . . by showing them with nooses around their necks, were circulated by various employees," and "[o]nce, an employee held up a noose and told a black co-worker that it was for him," Slip Op., at 2, the only such allegations were by appellant Roane based on hearsay (J.A. 2206-09), which the district court had the clear discretion to conclude was not anecdotal evidence of a character that supported class treatment.

The point is not to dispute the majority opinion's ruling that anecdotal evidence is relevant to class certification decisions or that the evidence, if proved true at trial on the merits, would be utterly deplorable. Instead, your petitioners respectfully submit that this evidence, which was cobbled together from separate discrete events, required the district court under *Broussard* to determine if it could be fairly used in a class context. Having determined that it could not, the district court's opinion was entitled to more deference on the hostile work environment claim than it received in either the majority opinion or the dissent.

CONCLUSION

Because the majority opinion with respect to deference, burden of proof, automatic certification under Rule 23(b) and other issues is in clear conflict with a controlling decision of the United States Supreme Court, and decisions of this and other courts of appeals, your petitioners pray that the

Court grant rehearing *en banc* or, in the alternative, panel rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on August 21, 2009, I have mailed the foregoing document by First Class Mail, postage pre-paid, to the following non-CM/ECF participants, addressed as follows:

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Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, and

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted

or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Multiple Class and Subclasses.

(1)(A) When a person sues as a representative of a class, the court must-- at an early practicable time—determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims,

issues, or defenses, and must appoint class counsel under Rule 23(g).
(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.
(2)(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.
(B) For any class certified under Rule 23(b)(3) the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:
the nature of the action,
the definition of the class certified,
the class claims, issues or defenses,
that a class member may enter an appearance through counsel if the member so desires,
that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
the binding effect of a class judgment on class members under Rule 23(c)(3).
(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not

favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate

therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Settlement, Voluntary Dismissal, or Compromise.

(1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request

exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of an order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

the work counsel has done in investigating potential claims in the action,

counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,

counsel's knowledge of the applicable law,

and
the resources counsel will commit to representing the class;
(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;
(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and
(iv) may make further orders in connection with the appointment.
(2) Appointment Procedure.
(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.
(B) When there is one applicant as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.
(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).
(h) Attorney Fees Award. In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by

agreement of the parties as follows:

(1) Motion for Award of Attorney Fees. A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) Objections to Motion. A class member, or a party from whom payment is sought, may object to the motion.

(3) Hearings and Findings. The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

(4) Reference to Special Master or Magistrate Judge. The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).